

THE STATUTE OF LIMITATIONS IN ANTITRUST LITIGATION

CARL H. FULDA* AND HOWARD C. KLEMME**

Enforcement of the federal antitrust laws¹ is, of course, primarily the business of the U. S. Department of Justice and the Federal Trade Commission. However, any person injured in his business or property by reason of conduct forbidden by the antitrust laws may sue in any U. S. district court and "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."² Similarly, "any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States. . . , against threatened loss or damage by a violation of the antitrust laws"³ Thus, private litigation may be resorted to as a supplement to, or, if plaintiff can afford it, as a substitute for governmental action; by all reports, such private litigation has enormously increased since the end of World War II.⁴

Our inquiry into the problem of statutory limitations must, necessarily, take into account this dual system of antitrust enforcement. Indeed, in so far as litigation initiated by the Government is concerned, we must further subdivide the field into criminal and civil proceedings. The former are governed by the general statute of limitations applicable to all federal offenses which bars prosecutions "unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."⁵ The application of this statute to Sherman Act prosecutions thus represents only one aspect of the general problem of

* Professor of Law, The Ohio State University College of Law; member, New York bar.

** Research and Teaching Assistant, The Ohio State University College of Law; member, Colorado bar.

¹ For a definition of the term see Clayton Act §1, 38 STAT. 730 (1914), 15 U.S.C.A. §§12-27 (1951), and Federal Trade Commission Act §4, 38 STAT. 719 (1914), 15 U.S.C.A. §44 (1951).

² Clayton Act §4, 38 STAT. 731 (1914), 15 U.S.C.A. §15 (1951); Sherman Act, §7, 26 STAT. 210 (1890); Wilson Tariff Act, §77, 28 STAT. 570 (1894).

³ Clayton Act §16, 38 STAT. 737 (1914), 15 U.S.C.A. §26 (1951).

⁴ See Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1063-65 (1952); *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary* [on H.R. 3408 to amend the Clayton Act by Granting a Right of Action to the United States to Recover Damages under the Antitrust Laws, Establishing a Uniform Statute of Limitations, and for other purposes,] 82d Cong., 1 Sess., Ser. 1, pt. 3, at 109-111 (1951).

⁵ 68 STAT. 1145 (1954), 18 U.S.C.A. §3282 (Cum. Supp. 1954). As originally enacted, the statute provided for a three year period. 62 STAT. 828 (1948). The Amendment lengthening that period to five years became effective on September 1, 1954, with respect to offenses (1) committed on or after that date or (2) committed prior thereto if on Sept. 1, 1954 prosecution therefor was not barred by the three-year period of limitation. Public L. No. 769, 83d Cong., 2d Sess. §10 (1954).

limitations relating to crimes (including criminal conspiracies), to which we shall refer in Section II of this article.

There is no federal limitation of civil antitrust actions instituted by the Government, and state statutes are not applicable against the United States.⁶ By the same token, it has been generally held that the defenses of laches and estoppel are not available against the Government.⁷

Consequently, the difficulties with respect to time limitation of antitrust enforcement arise primarily with respect to the area of private litigation. As noted above, such private litigation can be brought only in a federal court. Yet, Congress failed to provide a period of limitation.⁸ However, it would have been absurd to imagine that private antitrust claimants were to be permitted to delay indefinitely the bringing of such suits. Indeed, Congress clearly indicated that some period of limitation should govern such claims: It provided in Section 5 of the Clayton Act⁹ that whenever the United States commences a civil or criminal anti-

⁶ *U.S. v. Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U.S. 120, 125 (1886); "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." *Accord*, *U.S. v. Summerlin*, 310 U.S. 414 (1940). See 6 TOULMIN, *ANTI-TRUST LAWS* §5.6 and cases cited.

⁷ *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 409 (1917): "... [L]aches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest." *U.S. v. Southern Pacific Co.*, 259 U.S. 214, 240, (1922): No estoppel against Government in Sherman Act suit brought to compel defendant Co. to dispose of its controlling interest in Central Pacific Ry. Co.; defense of laches not recognized; *Times-Picayune Publishing Co. v. U.S.*, 345 U.S. 594, 623-624 (1953): "Doubtless, long-tolerated trade arrangements acquire no vested immunity under the Sherman Act; no prescriptive rights accrue by the prosecutor's delay." *U.S. v. Eastman Kodak Co. of New York*, 230 Fed. 522 (W.D.N.Y. 1916), *appeal dismissed*, 255 U.S. 578 (1921): Laches not applicable since defendants knew of Government's objections to their methods of doing business. *U.S. v. General Instrument Corp.*, 87 F. Supp. 157, 164 (D.C.N.J. 1949): Laches rejected as a matter of fact and law; preparation of civil antitrust suit necessitates "minute and detailed study to develop the facts," and United States asserted "rights as a sovereign to enforce a public policy" (citing *U.S. v. Beebe*, 127 U.S. 338, 344 (1888) and *U.S. v. Insley*, 130 U.S. 263, 266 (1889)). *Accord*, *U.S. v. Shubert*, 14 F.R.D. 471, 474 (S.D.N.Y. 1953), citing *American Surety Co. of New York v. U.S.*, 112 Fed. 2d 903, 906 (10th Cir. 1940). See, also, *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-227 (1940).

⁸ As originally reported to the Senate by its Judiciary Committee, the Clayton Act of 1914 included a six-year statute of limitations. This provision was omitted from the final draft. *Hearing Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 2d Sess., [on H.R. 7905: A Bill to Amend the Clayton Act with Respect to the Recovery of Triple Damages under the Antitrust Laws, and for other purposes,] ser. 14, pt. 5, at 24 and 99 (1950).

⁹ 38 STAT. 731 (1914), 15 U.S.C.A. §16 (1951).

trust suit, "the running of the statute of limitations in respect of each and every private right of action . . . based in whole or in part on any matter complained of in said suit . . . shall be suspended during the pendency thereof." The question, then, is: Where do we find the statute of limitations for these private rights of action?

An early attempt at discovering an applicable federal statute remained unsuccessful. In *Chattanooga Foundry and Pipe Works v. City of Atlanta*¹⁰ the city brought an action for recovery of treble damages against two Tennessee corporations in the United States Circuit Court for the Eastern District of Tennessee, alleging that it had been forced to pay an unreasonable price for iron water pipes as a result of an unlawful combination and price-fixing conspiracy of which defendants were members. The event complained of occurred more than three but less than five years before commencement of this action. The city invoked a provision in the Revised Statutes of the United States, now to be found in the Federal Judicial Code, that proceedings "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . .,"¹¹ but the court held that a treble damage action under the Sherman Act was not a suit for a penalty because "the test whether a law is penal . . . is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual . . ."¹² The court thus implied that the treble damage action was solely designed as a private remedy, and the facts of the *Chattanooga Foundry* case certainly justified this conclusion. The defendants in that case had already been found to be parties to a monopolistic combination in a prior suit brought against them by the Government.¹³ Significantly, the most attractive feature of treble damage actions seems to be the provision of the Clayton Act that a judgment or decree obtained by the Government against a defendant in an antitrust case "shall be prima facie evidence against such defendant" in a private action brought against him.¹⁴ This allows the private plaintiff "the advantage of government findings and government discoveries," and this arrangement is surely a wise and necessary one, since, as Thurman Arnold recently observed, "the ordinary small-business man just cannot bring a suit for treble damages unless he has a very large sum of money or unless the government does it for him."¹⁵ The tolling of the statute

¹⁰ 203 U.S. 390 (1906).

¹¹ 62 STAT. 974 (1948), 28 U.S.C.A. §2462 (1950), REV. STAT. §1047 (2d ed. 1878).

¹² *Huntington v. Attrill*, 146 U.S. 657, 668 (1892). To same effect see *Brady v. Daly*, 175 U.S. 148, 155, 156 (1899).

¹³ *Addyston Pipe & Steel Co. v. U.S.*, 175 U.S. 211 (1899).

¹⁴ See note 9 *supra*.

¹⁵ *Hearing Before the Subcommittee of the Judiciary Committee, U.S. Senate*, 81st Cong. 1st Sess., at 3-4 (1949), [on S. 1910 to amend the Sherman and Clayton Acts to provide a uniform period of limitations within which treble damage suits may be instituted under the antitrust laws].

of limitations during the pendency of a government suit reflects, of course, the same considerations.

While the *Ghattanooga* case thus pointed to the absence of any federal statute, it also held that, because of such absence, the statute of limitations of the state in which the suit was brought determined the matter pursuant to the Rules of Decision Act which ordains that "the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."¹⁶

Evidently, this opened a pandora's box of difficulties. Since causes of action under the antitrust laws are created by federal law and are subject to exclusive federal jurisdiction,¹⁷ state statutes of limitations explicitly applicable to such actions do not exist. Indeed, state statutes of limitations directed expressly and exclusively at federal claims and prescribing shorter periods of limitations than those prescribed for comparable actions under state law have been held unconstitutional as discriminating against rights arising under federal law in violation of the supremacy clause of Article VI of the Constitution and the equal protection clause of Section 1 of the 14th Amendment.¹⁸ Consequently, we must deal

¹⁶ This provision was first enacted on Sept. 24, 1789, c. 20, sec. 34, vol. 1, p. 92. It was reenacted as REV. STAT. §721 (2d ed. 1878) and is now to be found in the Judicial Code of 1948, 62 STAT. 944 (1948), 28 U.S.C.A. §1652 (1950). In *Campbell v. Haverhill*, 155 U.S. 610 (1895) the Court held that the six-year Massachusetts statute of limitations relating to torts barred a claim for patent infringement, a federal cause of action subject to exclusive federal jurisdiction, thus rejecting plaintiff's contention that in such a case the Rules of Decision Act should not govern because of the phrase "in cases where they apply." The Court observed (p. 614) that "to no class of state legislation has the above provision [Rules of Decision Act] been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction." The argument that states without power to create patent rights may not limit such rights could be recognized only if a state statute discriminated against causes of action enforceable only in the federal courts. (p. 615). In the absence of unreasonable discrimination it was "reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the state applicable to actions of similar nature." Otherwise, we would "have the anomaly of a distinct class of action subject to no limitation whatever; a class of privileged plaintiffs . . ." (p. 616).

¹⁷ For examples of federal rights enforceable in federal or state courts see Fair Labor Standards Act §16(b), 52 STAT. 1069 (1938), 61 STAT. 87 (1947), 63 STAT. 919 (1949), 29 U.S.C.A. §216(b) (Cum. Supp. 1954); Federal Employers Liability Act §6, 35 STAT. 66, as last amended 62 STAT. 989 (1948), 45 U.S.C.A. §56 (1954).

¹⁸ *Republic Pictures Corp. v. Kappler*, 151 Fed. 2d 543, 547 (8th Cir. 1945), *aff'd*, 327 U.S. 757 (1946). *Accord*, *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, 105 F. Supp. 506 (D.C. Colo. 1952), Defendant in treble damage action invoked Colorado statute: "All actions upon a liability created by a federal statute other than for a forfeiture or penalty for which actions no period of limitation is provided in such statute shall be commenced within two years after the cause of

with state statutes which were framed without any reference to, or consideration of, federal antitrust claims; and since all states do not have one statute of limitations, but a great many,¹⁹ the crucial problem would seem to be the selection of the appropriate limitation. We must, then, demonstrate how the courts try to find the proper statute of limitations for an antitrust case, a process somehow comparable to the job of a tailor attempting to select the best fitting garment for a choosy customer.

Defendants in the *Chattanooga* case urged that the cause of action was barred either by the one-year Tennessee statute "for statute penalties" or by the three-year statute relating to actions for "injuries to personal or real property; actions for detention or conversion of personal property."²⁰ Mr. Justice Holmes, speaking for the majority, rejected the first of these statutes because of the construction already adopted with respect to the similarly worded federal statute. The second was held not applicable for the following reasons:

It was pressed upon us that formerly the limitations addressed themselves to forms of action, that actions upon the case, such as this would have been, were barred in three years, . . . and that when a change was necessary by the doing away with the old forms of action, it is not to be supposed that the change was intended to affect the substance, or more than the mode of stating the time allowed. Of course, it was argued also that this was an injury to property, within the plain meaning of the words. But we are satisfied, on the whole, and in view of its juxtaposition with detention and conversion, that the phrase has a narrower intent . . . there is a sufficiently clear distinction between injuries to property and "injured in his business or property," the latter being the language of the Act of Congress. A man is injured in his property when his property is diminished. He would not be said to have suffered an injury to his property unless the harm fell upon some object more definite and less ideal than his total wealth. A trade-mark, or a trade name, or a title, is property, and is regarded as an object capable of injury in various ways. But when a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may, and stop there.²¹

Consequently, the Court held that the action was timely since it was

action shall have accrued." Motion to strike out defense granted. Held: Treble damage action is comparable to trespass on the case which in Colorado is subject to six-year statute, hence statute relied on by defendant is discriminatory and unconstitutional. See also *Campbell v. Haverhill*, *supra* note 16.

¹⁹ See OHIO REV. CODE c. 2305 (1953).

²⁰ These statutes are still in effect: TENN. CODE ANN. §§8595 and 8598 (Williams 1934).

²¹ 203 U.S. 390, 398, 399 (1906).

governed by the ten-year Tennessee statute which barred "all other cases not expressly provided for."²²

The quotation set forth above illustrates how the Court picked from three possible choices provided by the state code on limitation of civil actions. The Court, to borrow Professor Hart's telling phrase, thus tried to adopt or absorb²³ state law; yet it did not cite a single Tennessee decision. The question, then, arises as to the standards which should guide the process of adoption or absorption. Should the federal court scrutinize not only the state statutes, but also the state court decisions applying those statutes to comparable state causes of action, in order to determine eligibility for federal adoption? Or should the nature of the action and the state statute with the most appropriate language be determined solely by federal antitrust jurisprudence? In short, we are now faced with the question of *characterization*.

Although Mr. Justice Holmes in the *Chattanooga* case did not analyze the problem in those terms, his opinion seems to reflect the *federal* characterization approach at least in so far as the state statute of limitations for statutory penalties was concerned. Since a treble damage action was held not to be an action for a penalty within the federal meaning of that term, it could not be such an action within the state's connotation of the same term, or, at least, the state's connotation would be irrelevant. This may have justified the expectation that the *Chattanooga* case, to this day the only Supreme Court decision dealing with the problem which is the subject of this article, settled at least one point: State statutes of limitations governing actions for statutory penalties would never be applicable to private antitrust litigation.

If this expectation was ever seriously entertained, it proved to be unduly optimistic. Indeed, when we come to the three-year period for property damage, the *Chattanooga* decision switches from federal to state characterization, since the Court seemingly attempted to guess whether the Tennessee courts would have applied their own statute if an action of this kind could be brought before them.²⁴ In essence, the question is whether the federal courts should or should not be required to make and document that kind of hypothetical estimate; it can never be more than that for the

²² TENN. CODE ANN. §8601 (Williams 1934).

²³ Hart, *The Relations Between State and Federal Laws*, 54 COLUM. L. REV. 489, 529 (1954).

²⁴ The lower courts cited some Tennessee cases construing the Tennessee three-year statute: *City of Atlanta v. Chattanooga Foundry & Pipe Co.*, 101 Fed. 900, 909 (D.C.E.D. Tenn. 1900); 127 Fed. 23, 29, 31, 32 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906). *Cf.* *Cope v. Anderson*, 331 U.S. 461 (1947): Suit by receiver of insolvent national bank against shareholders residing in Ohio and Pennsylvania to enforce their statutory double liability under the National Banking Act. *Held*, that in absence of federal statute of limitations the statutes of Ohio and Pennsylvania limiting the time for bringing actions based on statutory liability and the "borrowing" statutes of those states, *as construed by the courts of those states*, govern the case.

obvious reason that state courts do not have jurisdiction to hear antitrust complaints. If the estimate must be made, we may even find that in some states the period of limitation for statutory penalties does apply to antitrust treble damage actions, the *Chattanooga* case to the contrary notwithstanding.

This conflict between federal and state characterization runs through all the reported cases with the result that the obvious lack of uniformity inherent in adoption of varying state laws is increased by confusion with respect to the methods of adoption. The matter is further complicated by the question as to whether the Rules of Decision Act requires either state or federal characterization. That act, after all, merely provides that the laws of the state shall govern, but, on its face, it does not reveal the process by which the applicable state law must be selected for the purpose of absorption into an otherwise exclusively federal situation.

I. CHARACTERIZATION AND THE CHOICE OF THE APPLICABLE PERIOD OF LIMITATION.

In some circuits, state characterization reigns supreme. Thus, in *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.*²⁵ the cause of action for treble damages arose in Illinois more than two years prior to the commencement of the action. The Seventh Circuit affirmed a judgment dismissing the complaint on the ground that it was barred by the Illinois statute which prescribed a two-year period for actions "for a statutory penalty."²⁶ The court observed that "the intent of the phrase, statutory penalty, as used in the statute, has been determined by the Supreme Court of Illinois" in a decision involving a state statute permitting recovery of triple damages by a shipper against a railroad which had charged freight rates in excess of those fixed by state authorities.²⁷ "In view of the close analogy between the cause of action there involved and one arising under Section 4 of the Clayton Act the decision would seem to be controlling. . . . In each, threefold damages and attorneys fees are in the nature of a penalty not recoverable except by virtue of the statute." But what about the *Chattanooga* case? Plaintiff was told that its reliance on that case was "misplaced" since "there the state determination was that the ten-year statute applied; here the state determination is that the two-year statute controls. In other words, in Illinois, actions such as this are, as decided by the highest court of the state, barred within two years."²⁸ As noted above, this may not be the correct reading of the

²⁵ 191 F. 2d 912 (7th Cir. 1951), noted in 65 HARV. L. REV. 1457 (1952).

²⁶ ILL. ANN. STAT. c. 83, §15 (Smith-Hurd 1935).

²⁷ *Chicago, Burlington & Quincy R.R. v. Jones*, 149 Ill. 361, 37 N.E. 247, 258 (1894).

²⁸ 191 F. 2d 912, 914 (7th Cir. 1951). The court added that this conclusion was binding under *Bauserman v. Blunt*, 147 U.S. 647 (1893). That case involved an action on a promissory note brought by a citizen of Illinois against a citizen of Kansas in a state court of Kansas and subsequently removed to a federal court: the Kansas statute of limitations as construed by the Supreme Court of Kansas was

Chattanooga case. However, the Seventh Circuit reaffirmed this position in two later cases,²⁹ one of which cited the Rules of Decisions Act in support of the proposition "that the applicable limitation must be determined by the state statute as interpreted by the courts of the state."³⁰

Significantly, these cases adopting the Illinois limitation of actions for statutory penalties stand alone. Everywhere else state statutes of limitations covering penal actions have been held inapplicable.³¹ Yet, this is not inconsistent with state characterization. Indeed, a plausible reconciliation between *Chattanooga* and state characterization may be found in *Florida Wholesale Drug, Inc. v. Ronson Art Metal Works, Inc.*³² That was a treble damage action brought in the district court in New Jersey by a Florida corporation against a New Jersey corporation for price discrimination in violation of the Clayton Act. The cause of action arose in Florida, but the Florida statute of limitations was not considered since the statute of the forum controls.³³ The New Jersey statute limiting to two years the time for any action "brought for any forfeiture upon any penal statute . . . when the benefit of the forfeiture and the action therefore is or shall be limited or given to the party aggrieved"³⁴ was also held inapplicable. The court explained that, because of *Chattanooga*, "it must be shown that the view of the state courts as to a penalty, differs radically from the view of the federal courts in that regard, before a state penalty limitation can be found applicable to this federal nonpenal proceeding";³⁵ the court's examination of the New Jersey cases resulted in the conclusion that no such difference could be found.³⁶ The apparent conflict with the Seventh Circuit could, thus, be resolved by the ob-

held applicable. Obviously, this was a very different situation than the one we are discussing in this article.

²⁹ *Schiffman Bros., Inc. v. Texas Co.*, 196 F. 2d 695 (7th Cir. 1952); *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F. 2d 284, 288 (7th Cir. 1954). In the latter case plaintiff contended that he was entitled to single damages. The court held that under the Clayton Act he was entitled to treble damages and none other, and that he could not avoid the two-year statute by claiming only single damages.

³⁰ *Schiffman Bros., Inc. v. Texas Co.*, 196 F. 2d 695, 696 (7th Cir. 1952). To the same effect see *DeLuca v. Loew's, Inc.*, 119 F. Supp. 474 (N.D. Ill. 1953) and *Barnett v. Warner Bros. Pictures Distributing Corp.*, 112 F. Supp. 5 (N.D. Ill. 1953).

³¹ *Florida Wholesale Drug, Inc. v. Ronson Art Metal Works, Inc.*, 110 F. Supp. 573, 577 (D.C.N.J. 1953) and cases cited. *Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747, 752, 753 (S.D. N.Y. 1953): see cases cited in note 23 *supra*.

³² See note 31 *supra*.

³³ RESTATEMENT CONFLICT OF LAWS §§603-604 (1934).

³⁴ N.J. STAT. ANN. 2A: 14-10(b) (1952).

³⁵ 110 F. Supp. 573, 575 (D.C. N.J. 1953). *Accord*, *Christensen v. Paramount Pictures*, 95 F. Supp. 446, 449 (D.C. Utah 1950).

³⁶ In 1922 a New Jersey federal court had come to the same conclusion in *Shelton Electric Co. v. Victor Talking Machine Co.*, 277 Fed. 433 (D.C. N.J. 1922). *But cf.* *Haskell v. Perkins*, 28 F. 2d 222 (D.C. N.J. 1928): Treble damage action held punitive and, therefore, does not survive claimant's death.

servation that the Illinois concept of statutory penalties is radically different and, therefore, compelled the Seventh Circuit to label an action as penal which would not be so labeled in many other jurisdictions.³⁷ In fact, it was emphasized that in selecting the proper statute, the court "must . . . determine not its own viewpoint as to what New Jersey limitation statute is applicable, but what the New Jersey state courts would decide was the New Jersey limitation statute applicable . . .";³⁸ it held that this was the six-year statute pertaining to "every action at law for . . . any tortious injury to the rights of another . . ." [other than personal injury, libel or slander],³⁹ which was designed for actions "on the case."⁴⁰

A similar characterization was applied in Delaware, where it was held that a treble damage action alleging violation of Section 7 of the Clayton Act⁴¹ "discloses a cause of action which, under the common law of Delaware, would be enforceable in an action on the case and not in an action of debt on a specialty."⁴² Therefore, the Delaware three-year limitation of actions "to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant"⁴³ was applied.

The method of state characterization described above thus resulted in the adoption of a two-year period in Illinois, a six-year period in New Jersey and a three-year period in Delaware. We now turn to inquire into the decisions in those circuits which talk in terms of federal characterization. In *Fulton v. Loew's Inc.*⁴⁴ plaintiff filed suit for treble damages in the district court in Kansas against an unlicensed foreign corporation engaged in interstate business in Kansas. The court held that under Kansas law such a corporation may avail itself of the Kansas statutes of

³⁷ In *Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747, 756 (S.D. N.Y. 1953), Judge Ryan said that the Illinois cases are "entirely in accord with *Chattanooga*."

³⁸ See note 35 *supra*.

³⁹ N.J. STAT. ANN. 2A: 14-1 (1952).

⁴⁰ *H. J. Jaeger Research Laboratories, Inc. v. Radio Corporation of America*, 90 F. 2d 826, 828 (3rd Cir. 1937): *Held*, that treble damage action would at common law be an action on the case, therefore six-year statute applies. "We have not overlooked the decisions of the courts of New Jersey."

⁴¹ 38 STAT. 731 (1914), 15 U.S.C.A. §18 (1951): Acquisition by one corporation of stock of another.

⁴² *Williamson v. Columbia Gas & Electric Corporation*, 110 F. 2d 15, 20 (3rd Cir. 1939), *cert. denied*, 310 U.S. 639 (1940). Obviously, the abolition of the common law forms of action by the Federal Rules of Civil Procedure was clearly irrelevant since this was a matter of state law pursuant to the Rules of Decision Act. *Williamson v. Columbia Gas & Electric Corporation*, *supra* at 19. *Accord*, *Park-In Theatres v. Paramount-Richards Theatres*, 90 F. Supp. 727 (D.C. Del. 1950), *aff'd*, 185 F. 2d 407 (3rd Cir. 1950), *cert. denied*, 341 U.S. 950 (1951); that case involved an action for conspiracy under Sherman Act. Note, *Disparities in Time Limitations on Federal Causes of Action*, 49 YALE L.J. 738 (1940).

⁴³ DEL. CODE ANN. tit. 10, §8106 (1953).

⁴⁴ 114 F. Supp. 676 (D.C. Kan. 1953).

limitations. Defendant invoked the one-year period for actions "upon a statute for penalty or forfeiture," urging that under Kansas court interpretations the action was penal. The court, however, held the three-year period applicable which governed actions "upon a liability created by statute, other than a forfeiture or penalty."⁴⁵ Significantly, the court conceded, on the basis of its examination of Kansas decisions, that Kansas courts, like Illinois courts, applied their one-year statute to actions instituted in Kansas to recover more than actual damages. Consequently, the rationale of state characterization would have required application of the one-year period in accordance with the *Hoskins* case⁴⁶ in the Seventh Circuit. However, the court adopted, instead, the "federal approach" which "starts with the initial premise that the nature of the action, as construed by the United States Supreme Court in the *Chattanooga* case, is remedial and compensatory and not penal. Clearly that was the holding, . . . else there would have been no reason ever to have had any concern with the state statute of limitations. . . . The cases taking the 'federal' approach seem to apply the state statute of limitations to the cause of action given under the Sherman Act as if the construction of that act by the Supreme Court were a part of it."⁴⁷ Indeed, the court felt "constrained" to take the federal approach because:

Federal law is dispositive of the time of accrual of a federal cause of action for the purpose of applying a state statute of limitations. *Rawlings v. Ray*, 312 U.S. 96. It governs the question who is the real party in interest, *U.S. v. Aetna Cas. & Surety Co.*, 338 U.S. 366; *Gas Service Co. v. Hunt*, 183 Fed. 2d 417; whether an amendment to a complaint relates back to the filing of the complaint so as to come within the limitations period, *Culver v. Bell & Loffland*, 46 Fed. 2d 29, *Am. Fidel. & Cas. Co. v. All American Bus Lines*, 179 Fed. 2d 7; and the time of commencement of an exclusively federal action, *Bonar v. Keyes*, 162 Fed. 2d 136, The doctrine of *Erie R.R. Co.* is inapplicable to the "areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Electric Co. v. Jefferson Electr. Co.*, 317 U.S. 173, 176.⁴⁸

Similarly, in *Electric Theater Co. v. Twentieth Century Fox Film Corp.*,⁴⁹ the same result—rejection of the Seventh Circuit state characterization approach and of the allegation that the cause of action was one for a statutory penalty—was reached on the basis of the following observations:

Whatever may be the judicial prerogative of state courts to

⁴⁵ KAN. GEN. STAT. §60-306 (1949).

⁴⁶ See note 25 *supra*.

⁴⁷ 114 F. Supp. 676, 682 (D.C. Kan. 1953).

⁴⁸ *Id.* at 683.

⁴⁹ 113 F. Supp. 937 (W.D. Mo. 1953).

construe their own statutes, we do not believe that they can ever assume the awesome role of Delphic Oracle on such a fundamental matter as to with finality characterize or classify a purely federal cause of action. It is true that a federal court will, particularly in diversity cases, apply state court construction to a state-derived cause of action. But when state court construction, even of its own statutes, invades the province of characterization in a field divorced from state regulation, then clearly such an invasion of the federal judicial province is entitled to no consideration. The line of demarcation between statutory construction and characterization is often elusive and distressingly vague. Yet, we cannot ignore the distinction. Although by federal law we are directed to the state statutes of limitations in cases of this kind, we do not think that such procedural directive transforms state adjective law into a springboard from which state courts can assert a formative influence on federal substantive law. Regardless of defendant's protestations to the contrary, to allow an antitrust action to be characterized as one for a penalty or forfeiture, depending on state court *stare decisis*, would involve considerably more than "statutory construction" for a limited procedural purpose.⁵⁰

These quotations epitomize the reasons for the federal approach. Indeed, the majority of courts, as noted above, rejected the "penal" characterization of antitrust actions for the same reasons.⁵¹ In Ohio, a federal district court adopted what might be called a mixed or composite approach: The one-year period for actions "upon a statute for a penalty or forfeiture"⁵² was held not applicable because the court found one Ohio case, in addition to dozens seemingly to the contrary cited by the defendant, which stated that a statutory police regulation enforceable by public authority and private complainants would not be regarded as penal.⁵³ Since this same Ohio case had been cited by the lower courts in *Chattanooga*, the court added that the result was in line with *Chattanooga*, and that in case of doubt as to the meaning given to state statutes of limitations by state court decisions, the federal court must determine the matter independ-

⁵⁰ *Id.* at 941.

⁵¹ See note 31 *supra*. See, particularly, *Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747, 751, 756, 757 (S.D. N.Y. 1953); *Winkler-Koch Engineering Co. v. Universal Oil Prod. Co.*, 100 F. Supp. 15, 28 (S.D. N.Y. 1951); *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, note 18 *supra*; *New York Credit Men's Adjustment Bureau, Inc. v. Bruno-New York, Inc.*, 120 F. Supp. 495 (S.D. N.Y. 1954). Federal characterization has also been used to support a holding that the survival of a treble damage action should be determined by federal law and state limitation applicable to non-surviving actions therefore is irrelevant. *Barnes Coal Corp. v. Retail Coal Merchants' Ass'n*, 128 F. 2d 645 (4th Cir. 1942), noted in 42 COLUM. L. REV. 1346 (1942).

⁵² OHIO REV. CODE §2305.11 (1953).

⁵³ *Reid v. Doubleday & Co.*, 109 F. Supp. 354, 361, 362 (N.D. Ohio 1952), citing *Pittsburgh, Ft. Worth & C. Ry. Co. v. Methven*, 21 Ohio St. 586 (1871).

ently.⁵⁴ It was, finally, held that the six-year statute for actions "upon a liability created by statute other than a forfeiture or penalty"⁵⁵ was controlling.⁵⁶

It thus appears that courts using federal characterization look to *Chattanooga* like the astronomer looks to the North Star: A fixed and invariable point which settles once and for all that state statutes applicable to penalties shall never be adopted. Hence, this approach is certainly simpler than the state approach,⁵⁷ although it settles only a negative point, since it excludes only one type of statute from consideration; if several others are left to pick from, the search would have to start all over again. However, in the majority of jurisdictions the limitation for actions creating statutory liabilities other than penalties has been held to apply.⁵⁸ But in some states, other types of limitations were adopted.⁵⁹ In Kentucky the courts have applied different statutes to different types of antitrust claims: A treble damage action for conspiracy under Section 1 of the Sherman Act was held barred by the one-year statute limiting "an action for conspiracy,"⁶⁰ while a treble damage action for violation of the

⁵⁴ Reid v. Doubleday & Co., *supra* note 53 at 363.

⁵⁵ OHIO REV. CODE §2305.07 (1953).

⁵⁶ Reid v. Doubleday & Co., *supra* note 53; Reid v. Appleton-Century-Crofts, Inc., 112 F. Supp. 279 (N.D. Ohio 1953).

⁵⁷ However, Cope v. Anderson, *supra* note 24, followed the state approach, indicating that the present attitude of the Supreme Court as to state statutes of limitation in federal areas outside the antitrust field is inconsistent with the *Chattanooga* case. See, generally, Blume and George, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937 (1951).

⁵⁸ See notes 56, 51, 49, 44 *supra*; Momand v. Universal Film Exchanges, 172 F. 2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); Levy v. Paramount Pictures, 104 F. Supp. 787 (N.D. Cal. 1952); Burnham Chemical Co. v. Borax Consolidated, Ltd., 170 F. 2d 569 (9th Cir. 1948), *cert. denied*, 336 U.S. 924 (1949); Suckow-Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., 185 F. 2d 196 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951); Crummer Co. v. DuPont, 117 F. Supp. 870 (N.D. Fla. 1954). It is hardly necessary to add that there are variations in the length of the statutory periods.

⁵⁹ As explained above, the *Chattanooga* case itself adopted the "omnibus" statute. To the same effect see Ben C. Jones & Co. v. West Publishing Co., 270 Fed. 563 (5th Cir. 1921), *writ of error dismissed*, 270 U.S. 665 (1926), Texas four-year statute for "every action . . . for which no limitation is otherwise prescribed." TEXAS CIV. STAT. ANN., art. 5529 (Vernon 1941); Harvey v. Booth Fisheries, 228 Fed. 782 (W.D. Wash. 1915), Washington three-year statute, now to be found in WASH. REV. CODE §4.16.080(2) (1951), "for any other injury to . . . rights of another not hereinafter enumerated." Christensen v. Paramount Pictures, 95 F. Supp. 446, 450 (D.C. Utah 1951), Utah four-year "omnibus" statute limiting "an action for relief not otherwise provided for by law." UTAH CODE ANN. §78-12-25(2) (1953). Don George, Inc. v. Paramount Pictures, 111 F. Supp. 458, 465, 471 (W.D. La. 1951), plea of prescription overruled and determination of applicable statute deferred until trial; court states that either one-year statute for torts or ten-year omnibus statute would apply. LA CIV. CODE, art. 3536, 3544 (West 1953).

⁶⁰ Northern Ky. Telephone Co. v. Southern Bell Telephone & Telegraph Co.,

brokerage provision of the Robinson-Patman Act⁶¹ was held subject to the five-year statute.⁶²

All of this presents a bewildering variety of different limitation periods in the various states.⁶³ However, the picture would be incomplete without consideration of the so-called "borrowing statutes" which create additional diversity. An example of such a statute is Section 2305.20 of the Ohio Revised Code which provides:

If the laws of any state or country where a cause of action arose limit the time for the commencement of the action to a lesser number of years than do the statutes of this state in like causes of action then said cause of action shall be barred in this state at the expiration of said lesser number of years.

In other words, the principle that the statute of limitations of the forum applies has been modified by these statutes which, under certain prescribed circumstances, "borrow" the statute of limitations of the jurisdiction where the cause of action arose. Since a federal court in private antitrust litigation must adopt the applicable state statute of the state in which the court is sitting, it is obvious that the adoption must include the "borrowing" statute of that state, if one has been enacted. Thus, a federal court in California applied the Texas statute of limitations pursuant to the California borrowing statute in a treble damage action where the cause of action arose in Texas,⁶⁴ and a federal court in New York applied the two-year statute of Montana under similar circumstances.⁶⁵

While this may appear comparatively simple, more perplexing complications lurk behind the borrowing statutes. In *Seaboard Terminals Corporation v. Standard Oil Co. of N.J.*⁶⁶ plaintiff sued Standard Oil, American Oil and Socony-Vacuum in the southern district of New York. The complaint alleged a conspiracy in restraint of trade which put plaintiff out of business in May, 1933; the cause of action arose in Maryland, where plaintiff's principal activities were carried on. Defendants Standard

73 F. 2d 333 (6th Cir. 1934), *cert. denied*, 294 U.S. 719 (1935), one-year statute for action for conspiracy, Ky. REV. STAT. §413.140(1)(c) (Baldwin 1943).

⁶¹ 49 STAT. 1527 (1936), 15 U.S.C.A. §13(c) (1948).

⁶² *Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.*, 37 F. Supp. 728, 738 (W.D. Ky. 1941), Ky. REV. STAT. §413.120 (Baldwin 1943). This statute includes actions upon statutory liabilities and actions for penalties.

⁶³ Note, *Treble Damage Time Limitations: Federalism Rampant*, 60 YALE L.J. 553, 554 (1951) for a breakdown of the results in all jurisdictions, showing that periods ranging from one to six years have been held applicable in antitrust cases in addition to the ten-year period in the *Chattanooga* case.

⁶⁴ *Aero Sales Co. v. Columbia Steel Co.*, 119 F. Supp. 693 (N.D. Cal. 1954). This decision held the two year period limiting actions for debts, TEXAS CIV. STAT. ANN. art. 5526(4) (Vernon 1941) applicable, thus disapproving *Jones & Co. v. West Publishing Co.*, *supra* note 59.

⁶⁵ *Hansen Packing Co. v. Swift & Co.*, 27 F. Supp. 364 (S.D. N.Y. 1939). *Accord*, *Electric Theater Co. v. Twentieth Century Fox Film Corp.*, *supra* note 49, court in Missouri applied Kansas statute.

⁶⁶ 24 F. Supp. 1018 (S.D. N.Y. 1938), *aff'd*, 104 F. 2d 659 (2d Cir. 1939)..

and American were licensed and engaged in business in Maryland, but defendant Socony-Vacuum was not so licensed and did no business in Maryland. The action was commenced in June, 1936, more than three years after the harm inflicted on plaintiff. Pursuant to the New York borrowing statute, the court applied the three-year statute of Maryland governing actions on the case and granted motions to dismiss as to defendants Standard Oil and American Oil. However, as to defendant Socony-Vacuum the motion to dismiss was denied. A Maryland statute provides that the limitation period shall not begin to run in favor of a defendant absent from the state when the cause of action arises. Socony-Vacuum was absent. "New York, in adopting the law of Maryland for limitations on actions of this type, adopts not only the period of limitation but also the provisions of Maryland that toll the running of the period. . . . Action against that defendant not having been barred in Maryland, there is nothing in Section 13 of the Civil Practice Act that bars action against it here. The normal time fixed in the New York statutes for commencement of the action, six years, had not run when the action was instituted."⁶⁷ A similar result was reached in a more recent New York case involving eight corporate defendants, only four of whom were held entitled to invoke the three-year Kansas statute.⁶⁸

Surely, these cases were correctly decided. By the same token, they present the most bizarre consequence of the process of absorption of state law. It may be bad enough that a cause of action exclusively cognizable by federal courts is subject to different periods of limitations dependent on the law of the state where the action happens to be brought. But it is worse that different time limitations have to be applied to different defendants in the same action.

At this point, the reader may wonder why nothing has been said about private injunction suits; all the cases discussed in this article involved treble damage actions. Surprisingly, only one case was found which held that "the local statute of limitations applicable to actions for damages will also be adopted and applied, in exercise of the equity jurisdiction of this court, to the injunctive relief sought pursuant to §16 of the Clayton Act, 15 U.S.C.A. §26."⁶⁹ Perhaps this is so since the nature of injunction suits is such that they are brought at the earliest moment to prevent future

⁶⁷ Id. at 1020.

⁶⁸ *Winkler-Koch Engineering Co. v. Universal Oil Products Co.*, 100 F. Supp. 15 (S.D. N.Y. 1951).

⁶⁹ *United West Coast Theatres Corp. v. South Side Theatres, Inc.*, 86 F. Supp. 109, 111 (S.D. Cal. 1949). Plaintiffs sought a declaratory judgment as to their rights under an agreement relating to the operation of certain motion picture theaters. Defendants counterclaimed for treble damages and injunctive relief under the antitrust laws. The only authority cited by the court was *Russell v. Todd*, 309 U.S. 280, 293 (1940), involving an equity suit for enforcement of shareholders' liability for the debts of a joint stock land bank under the Federal Farm Loan Act.

harm, and that, therefore, opportunities for invoking the statute of limitations are less likely to arise in such cases.

II. ACCRUAL AND TOLLING OF THE CAUSE OF ACTION

Finding the applicable period of limitation is, perhaps, the most difficult, but by no means the only problem in this area. Indeed, no limitation question can be solved without determining when the period begins to run, whether it might have been interrupted by some event occurring after it has begun, and, if so, how long the interruption lasted.

It is well settled that the private antitrust cause of action accrues and the statute of limitations begins to run when the damage is inflicted upon the plaintiff.⁷⁰ However, this does not dispose of the problem. Treble damage actions, like Government prosecutions, frequently allege a conspiracy on the part of defendants committed by a series of overt acts extending over a period of time. In such a case the question arises as to whether the statute begins to run only when the purpose of the conspiracy has been accomplished, or the last overt act has been committed, or whether the cause of action is to be deemed divisible for limitation purposes in the sense that the statute begins to run at the time each overt act is committed, with the result that damages for some acts may be barred and damages for later acts may not be barred.

At this point a comparison of private litigation and criminal prosecutions must be made. In criminal cases brought on an indictment or information alleging a continuous conspiracy it has been uniformly held that the federal statute of limitations governing such cases⁷¹ does not begin to run until the conspiracy has been successfully completed or abandoned.⁷² In *Northern Kentucky Telephone Co. v. Southern Bell*

⁷⁰ *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. 2d 742, 751 (9th Cir. 1936), *cert. denied*, 299 U.S. 613 (1937); *Bluefield S.S. Co. v. United Fruit Co.*, 243 Fed. 1, 20 (3rd Cir. 1917), *dismissed*, 248 U.S. 595 (1919); *Levy v. Paramount Pictures, Inc.*, 104 F. Supp. 787 (N.D. Cal. 1952); *Park-In Theatres, Inc. v. Paramount-Richards Theatres*, 90 F. Supp. 727 (D.C. Del. 1950), *aff'd*, 185 F. 2d 407 (3rd Cir. 1950), *cert. denied*, 341 U.S. 950 (1951); *Seaboard Terminals Corp. v. Standard Oil Co. of N.J.*, *supra* note 66; *Pastor v. Am. Tel. & Tel.*, 76 F. Supp. 781 (S.D. N.Y. 1940); *McClellan v. Montana-Dakota Utilities Co.*, 204 F. 2d 166 (8th Cir. 1953), *cert. denied*, 346 U.S. 825 (1953).

⁷¹ See note 5 *supra*.

⁷² *U.S. v. Kissel and Harned*, 218 U.S. 601, 607 (1910), ". . . when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one." At p. 608 Mr. Justice Holmes added: "A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. . . . The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes." *Accord*, *Boyle v. U.S.*, 259 Fed. 803 (7th Cir. 1919); *U.S. v. Johnson*, 165 F. 2d 42 (3rd Cir. 1947), *cert. denied*, 332 U.S. 852 (1948); *U.S. v. Detroit Sheet Metal & Roofing Contractors Ass'n*, 116 F. Supp. 81 (E.D. Mich. 1953).

Telephone and Telegraph Co.,⁷³ the question arose for the first time as to whether this doctrine should be followed in a civil action for treble damages. The applicable state statute prescribed a limitation period of one year. The action was commenced on May 2, 1931, alleging that defendants entered into a conspiracy in 1926 which continued since then. But all overt acts alleged by plaintiff occurred more than one year prior to May 2, 1931. Plaintiff, relying on the decisions involving criminal prosecutions, contended "that a conspiracy, until successful or terminated, is a continuing wrong, and that, so long as damages flow, and this without regard to the time of formation or the commission of overt acts, the statute does not begin to run." The Sixth Circuit held that the criminal cases do not justify such broad interpretation for civil cases, since "no civil action will lie for a conspiracy unless there be an overt act that results in damage to the plaintiff." Thus, "when there is an overt act, or the last of a contemplated series of overt acts, the cause of action accrues and the statute begins to run."⁷⁴ Hence, the action was held barred.⁷⁵

Similarly, in *Momand v. Universal Film Exchanges, Inc.*,⁷⁶ the First Circuit suggested that the criminal rule could not simply be transplanted into treble damage actions; otherwise "a single act of damage in an antitrust case would be subject to no period of limitation so long as the conspiracy continued, although no further injury was done to the plaintiff." Based on this reasoning, the First Circuit affirmed a ruling "that a cause of action for each invasion of the plaintiff's interest arose at the time of that invasion and that the applicable statute of limitations ran from that time."

It is true that plaintiff in the *Momand* case sued as assignee of claims assigned to him by several corporations in April, 1931 and December, 1933, which plaintiff characterized as asserting separate causes of action for injuries said to have been inflicted by defendants on each one of plaintiff's assignors. Nevertheless, plaintiff contended that he was suing as assignee of the victims of a continuing conspiracy, and it was, precisely, this contention which the court rejected. *Park-In Theatres, Inc. v. Paramount-Richards Theatres, Inc.*,⁷⁷ took the same approach: The action in that case indicated two overt acts, and both had been committed more than three years before the suit was filed. Citing *Momand*, and holding the action was barred, the Court said that:

⁷³ See note 60 *supra*.

⁷⁴ The court added: "If this were not true, then it would result that, in every case where damages resulting from a wrongful act are in their nature continuing, there would be no limitation upon the right of action, and the beneficent purpose of the statute to put a period to the right to sue would be defeated." 73 F. 2d 333, 335 (6th Cir. 1934).

⁷⁵ See also *Winkler-Koch Engineering Co. v. Universal Oil Products Co.*, *supra* note 68, for recognition of "the single nature of plaintiff's cause of action." 100 F. Supp., at 30.

⁷⁶ 172 F. 2d 37, 49 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949).

⁷⁷ 90 F. Supp. 727 (D.C. Del. 1950).

A civil case . . . is based upon the damage caused by the commission of the overt act and the applicable statute must run from the time of the commission of that act which is alleged to have caused the damage. . . .

In the present complaint two, and two only, overt acts are expressly alleged and *these are of date beyond the Statute of Limitations, although damages resulting therefrom may have continued.*⁷⁸ (Emphasis supplied.)

We may, then, conclude that accrual of the cause of action for treble damages based on a conspiracy occurs when damages are inflicted by overt acts. In criminal cases, where the emphasis is not the individual harm, but the public interest, the last overt act is not decisive, and the statute may begin to run at a subsequent date, if the conspiracy continues. Moreover, since the purpose of the private action is the redress of individual damage, the statute begins to run from each overt act inflicting such damage, with the result that, usually, the plaintiff may recover only if at least one overt act was committed within the limitation period. Hence, as shown in *Momand*, and many other cases,⁷⁹ the claim for damages asserted in one action may be barred with respect to some but not all overt acts alleged in the complaint. In other words, for limitation purposes "each overt act creates a new cause of action."⁸⁰

But suppose the complaint is not based on the theory of a conspiracy constituting a series of separate and divisible acts; instead, plaintiff asserts that defendants acted pursuant to a *continuous* plan to drive him out of business by threatening his customers with patent infringement suits, harassing plaintiff and his licensees with spurious lawsuits and defaming his products. In such a situation, at least one court found a single, indivisible cause of action which was not barred with respect to any part of the damages inflicted.⁸¹ In another case the court indicated that the cause of action accrued when plaintiff was forced to sell his theatre as a result of a series of prior unlawful acts by defendant.⁸² This suggests that the time of accrual of the cause of action for damages from a conspiracy may depend on the facts of each conspiracy case, the way these facts are described in the pleadings and the court's willingness to accept that description as relevant to and determinative of the accrual problem.⁸³ Ob-

⁷⁸ *Id.* at 729.

⁷⁹ *Christensen v. Paramount Pictures*, *supra* note 59; *Bluefield S.S. Co. v. United Fruit Co.*, *supra* note 70; *Aero Sales Co. v. Columbia Steel Co.*, *supra* note 64; *Fulton v. Loew's, Inc.*, *supra* note 44; *Bascom Launder Corp. v. Farny*, 10 F.R.D. 421 (S.D. N.Y. 1950); *Levy v. Paramount Pictures, Inc.*, 104 F. Supp. 787 (N.D. Cal. 1952).

⁸⁰ *Wilson, The Origin and Limited Life of the Anti-Trust Cause of Action*, 21 U. KAN. CITY L. REV. 127, 128-131 (1953).

⁸¹ *Winkler-Koch Engineering Co. v. Universal Oil Products Co.*, *supra* note 68.

⁸² *Leonia Amusement Corp. v. Loew's, Inc.*, *supra* note 51.

⁸³ *Wilson, op. cit. supra* note 80, at 138, 139.

viously, a finding that the cause of action for the redress of *all* damages resulting from the conspiracy accrued at the time of the last overt act would, in effect, prolong the limitation period, while the theory of divisible causes of action might provide an incentive for commencing the action soon after plaintiff had suffered at least some damage. On the other hand, it may be difficult to prove damages before the conspiracy has reached its goal. In any event, the theory of divisible causes of actions reflects the policy of imposing on antitrust plaintiffs the duty of diligence in filing suits, and this may be more in keeping with the general philosophy of limitations than the opposite approach, at least in those situations where damage claims can be substantiated even though the conspiracy continues.

Plaintiff's duty of diligence is also an issue in another and, perhaps, even more important aspect of the accrual problem. Plaintiffs in treble damage actions charging continuous conspiracies not infrequently allege that the conspiracy was fraudulently concealed and that the statute should not begin to run against them until they *discovered* the conspiracy. In such a case the question arises as to whether plaintiffs were actually ignorant of the conspiracy, and whether they could have learned about it by the exercise of reasonable diligence. If so, the plea of ignorance may have to be disregarded.

This question was squarely presented in *Burnham Chemical Co. v. Borax Consolidated, Ltd.*⁸⁴ The action was instituted in July 1945 in the northern district of California, complaining of certain overt acts committed by defendants in 1925 and 1928 in pursuance of a conspiracy instigated by British and German interests to monopolize world trade in borax. The complaint alleged that, as a result of these acts, plaintiff's plant was closed in January 1929, that since that time plaintiffs attempted to secure from the United States Government a mineral lease, and that defendants, from 1929 to the time of suit, made persistent efforts to thwart such plans. Plaintiff admitted that it could not prove damages from this, but that, without want of diligence on its part, it was ignorant of defendants' earlier fraudulent activities, the true nature of which it discovered only in 1944, when the Government filed an antitrust suit against defendants. Only then did plaintiff learn about the conspiracy, and its complaint was based on the same allegations as those contained in the Government's complaint. Plaintiff thus contended that its cause of action accrued only in 1944, the year of discovery, and, therefore, the California three-year statute was no bar to its action. The Ninth Circuit, affirming a judgment dismissing the complaint, said:

We agree with the conclusions. . . . that the record firmly establishes as a fact that during the time from May 17, 1929 to October 10, 1939 appellant knew, or had good cause and reason to believe, that its business had been theretofore damaged and that it had been driven out of business by acts of appellees

⁸⁴ 170 F. 2d 569 (9th Cir. 1948), *cert. denied*, 336 U.S. 924 (1949).

which violated the antitrust laws of the United States; that appellant was, during this period, convinced that it had a good case against appellees for the damage it had then suffered. . . . We hold that . . . the only damages for which a recovery might be had are those which accrued and were suffered within three years prior to the filing of the complaint and the record reveals that none were shown during this period. . . .⁸⁵

The same court reached the same result in a subsequent suit brought by other domestic manufacturers of borax against the same defendants.⁸⁶ Here, again, the court emphasized that "the ultimate and determinative facts constituting the legal basis of this action" were known to plaintiffs many years before they filed suit and that, consequently:

The claimed ignorance of the existence of a formal conspiracy along with its exact date, precise terms, specific objectives and other evidentiary matter would be immaterial so far as regards the question of the California statute of limitations, as would any alleged concealment thereof. Furthermore, appellant's bare allegation of fraudulent concealment is but a conclusion of law which falls far short of the particularity of statement required by Rule 9(b).⁸⁷

This would seem to imply, as indeed, it has been repeatedly stated by other courts,⁸⁸ that specific pleadings of fraudulent concealment and of plaintiff's inability to discover the facts with due diligence, if sustained by the evidence, would prevent accrual of the cause of action. It would, of course, be very difficult to sustain the burden of proving ignorance not due to negligence; yet, antitrust claimants have occasionally succeeded in persuading juries and courts so to hold.⁸⁹

⁸⁵ *Id.* at 578.

⁸⁶ *Suckow-Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F. 2d 196 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951).

⁸⁷ *Id.* at 209. For another example of judicial insistence on plaintiff's diligence see *Ben C. Jones & Co. v. West Publishing Co.*, 270 Fed. 563 (5th Cir. 1921), *writ of error dismissed*, 270 U.S. 665 (1926): Filing of action will not toll statute unless service of summons be made within reasonable time thereafter.

⁸⁸ *Crummer Co. v. DuPont*, 117 F. Supp. 870, 875 (N.D. Fla. 1954): "A party seeking to avoid the bar of the statute on account of fraud must aver and show lack of knowledge and that he used diligence to discover it." *Strout v. United Shoe Machinery Co.*, 208 Fed. 646, 651, 652 (D.C. Mass. 1913). Plaintiff required "to specify the date and circumstances of his discovery of the cause of action, and his allegations must show that he exercised reasonable diligence, yet was unable to discover it earlier." *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. 2d 742, 752 (9th Cir. 1936), *cert. denied*, 299 U.S. 613 (1937).

⁸⁹ *American Tobacco Co. v. People's Tobacco Co.*, 204 Fed. 58 (5th Cir. 1913): question whether plaintiff knew, or ought to have known, that decline of its profits was due to defendant's conspiracy, was submitted to the jury; see also *Winkler-Koch Engineering Co. v. Universal Oil Products Co.*, 100 F. Supp. 15, 29 (S.D. N.Y. 1951). For an example of the same problem outside the antitrust field, see *Phillips Petroleum Co. v. Johnson*, 155 Fed. 2d 185, 191 (5th Cir. 1946), *cert. denied*, 329 U.S. 730 (1946). See, generally, as to accrual of the statute of

Apart from the accrual problem, which determines the time the statute begins to run, other grounds for tolling the statute require brief reference. As noted above, adoption of the state statutes implies adoption of their tolling provisions. In addition, there are federal grounds for tolling. One of these is probably no longer of current interest: The so-called Federal "Moratorium" or "War Time Tolling Act" provided "that the running of any existing statute of limitations applicable to violations of the antitrust laws of the United States . . . shall be suspended until June 30, 1946" in all cases where the existing statute had not yet fully run on October 10, 1942, when this act became effective.⁹⁰ The other is the vitally important second paragraph of Section 5 of the Clayton Act⁹¹ which tolls the statute in private actions during the pendency "of a Government suit involving the same facts."

It seems to be settled that this tolling provision is available only against defendants who were also defendants in the Government suit, and that it ceases to be effective against any defendant as soon as a final judgment in the Government suit has been rendered against such defendant.⁹² The only real difficulty arises with respect to the question as to whether *consent decrees* do or do not terminate the "pendency" of a Government suit. This question was presented in several cases involving treble damage actions against the major motion picture producers and distributors who were defendants in the Government's suit in *U.S. v. Paramount*, which was instituted in 1938. In November 1940 a consent decree was entered against four of the defendants without benefit of trial; this decree recited that it should not be construed as an admission or adjudication of the truth of the charges, and provided for continuation of the proceedings

limitations in cases of fraudulent concealment and plaintiff's duty of diligence in discovery, 54 C.J.S., *Limitations of Action* §§183-196 (1948).

⁹⁰ 56 STAT. 781 (1942), c. 589, 77th Cong., 2d Sess., Oct. 10, 1942, as amended by 59 STAT. 306 (1945), 79th Cong. 1st Sess., c. 213, June 30, 1945. This act has been frequently applied to private antitrust litigation. *Tiffin Building Corp. v. Balaban & Katz Corp.*, 87 F. Supp. 121 (N.D. Ill. 1949); *United West Coast Theatres Corp. v. South Side Theatres, Inc.*, *supra* note 69; *Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484 (W.D. Ark. 1949), *reversed on other grounds*, 191 F. 2d 38 (8th Cir. 1951); *Reid v. Appleton-Century-Crofts, Inc.*, *supra* note 56; *Christensen v. Paramount Pictures, Inc.*, *supra* note 59.

⁹¹ See note 9 *supra*.

⁹² *Levy v. Paramount Pictures, Inc.*, 104 F. Supp. 787, 789 (N.D. Cal. 1952); *Momand v. Universal Film Exchanges*, 172 F. 2d 37, 48 (1st Cir. 1948), *cert. denied*, 336 U. S. 967 (1949); *Electric Theater Co. v. Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937, 944 (W.D. Mo. 1953). A Government action ceases to be "pending" when "a final decree is either disposed of on appeal, or, if no appeal is taken, when the time for appeal has expired." In *Christensen v. Paramount Pictures*, *supra* note 59, the tolling provision was held not applicable against the wholly owned subsidiary of a parent corporation when only the parent was a party to the Government suit. The tolling was also not available against a defendant who was a party in a government action for the purpose of rescinding a release of treble damage claims: *Duffy Theatres, Inc. v. Griffith Consolidated Theatres, Inc.*, 208 F. 2d 316 (10th Cir. 1953), *cert. denied*, 347 U.S. 935 (1954).

after a specified period of time.⁹³ Four years later, the Government moved for trial, and the case reached the Supreme Court, which in 1948 affirmed in part a decree enjoining certain practices; the case was, however, remanded to the district court for the purpose of reconsidering the adequacy of the remedies originally prescribed by that court.⁹⁴ Subsequently, new consent decrees were entered into on November 8, 1948 and March 3, 1949 against defendants RKO and Paramount who preferred not to wait for the district court's decision on remand.⁹⁵ These consent decrees stated that jurisdiction was retained "for the purpose of enabling any of the parties to this consent decree to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof. . . ."⁹⁶ Orders were entered pursuant to this clause of these decrees from time to time as late as January 2, 1951.⁹⁷ A decree against the other non-consenting defendants was entered and affirmed in 1950.⁹⁸

The courts have been unanimous in holding that the first consent decree of November 20, 1940 was interlocutory in nature and, therefore, did not terminate the pendency of the Government suit with the result that the statute of limitations remained tolled.⁹⁹ With respect to the 1948 and 1949 consent decrees the problem was more difficult, since these decrees purported to decide the controversy on the merits after remand from the Supreme Court to the district court, even though they left the door open for future adjustments to changing conditions; however, this is not an uncommon practice in equity. Hence, with one exception, all courts have considered these decrees as final for the purpose of terminating the tolling effect of the Government suit against the consenting defendants, as provided in Section 5 of the Clayton Act.¹⁰⁰ In the majority view, it was deemed irrelevant that the 1948 and 1949 consent decrees were subsequently modified. On the other hand, the minority view would prolong

⁹³ U. S. v. Paramount Pictures, 66 F. Supp. 323, 331-33 (S.D. N.Y. 1946).

⁹⁴ 334 U.S. 131 (1948). *Decision on remand*, 85 F. Supp. 881 (S.D. N.Y. 1949).

⁹⁵ Sun Theatre Corp. v. RKO Radio Pictures, 213 F. 2d 284, 293, 294 (7th Cir. 1954). The consent decrees mentioned in the text were entered *before* the district court's decision on remand from the Supreme Court.

⁹⁶ Don George, Inc. v. Paramount Pictures, Inc., 111 F. Supp. 458, 466 (W.D. La. 1951).

⁹⁷ Sun Theatre Corp. v. RKO, *supra* note 95.

⁹⁸ Loew's, Inc. v. U.S., 339 U.S. 974 (1950).

⁹⁹ Sun Theatre Corp. v. RKO, *supra* note 95; Leonia Amusement Corp. v. Loew's, Inc., *supra* note 51; Twentieth Century Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846 (8th Cir. 1952), *cert. denied*, 343 U.S. 942 (1952); Christensen v. Paramount Pictures, *supra* note 59.

¹⁰⁰ Manny v. Warner Bros. Pictures, Inc., 116 F. Supp. 807 (S.D. Cal. 1953); Sun Theatre Corp. v. RKO, *supra* note 95; Barnett v. Warner Bros. Pictures Distributing Corp., 112 F. Supp. 5 (N.D. Ill. 1953). *Contra*, Don George, Inc. v. Paramount Pictures, Inc., *supra* note 96. Comment, 22 U. OF CHI. L. REV. 514 (1955).

the tolling period as long as jurisdiction is retained in a consent decree. This might conceivably wipe out any effective limitation, or discourage the use of consent decrees with retention of jurisdiction. In fact, it might even be argued under this theory that final, non-appealable decrees issued against non-consenting defendants should not be considered as ending the Government action if retention of jurisdiction has been provided. We agree with the recent suggestion of the Attorney General's National Committee to Study the Antitrust Laws that this would be undesirable.¹⁰¹

The Committee also recommended to amend Section 5 of the Clayton Act by a specific proviso that suspension "should be limited to the period of time during which the Government action is actively pending and contested."¹⁰² It could be argued that there was no active contest for several years after the *Paramount* decree of November 1940; therefore, the amendment proposed by the Committee, taken alone, would have suspended the tolling period at that time. Yet, this would have been inequitable because the 1940 consent decree was not a "final" decree within the meaning of the first paragraph of Section 5 of the Clayton Act and, consequently, could not have been admitted in evidence in any private suit against the same defendants,¹⁰³ although the statute of limitations would have begun to run pursuant to the second paragraph of Section 5 for the benefit of the same defendants. Perhaps it was in recognition of this difficulty that the committee added this additional recommendation:

The suspension [of the statute of limitations] should be effective only for cases where the person relying on the suspension is permitted to introduce the judgment or decree in the Government suit as prima facie evidence under the other provisions of Section 5, or where he would have been permitted to introduce such judgment or decree but for the fact that the Government lost its case or the judgment or decree was entered on consent. . . .¹⁰⁴ (Emphasis supplied.)

¹⁰¹ ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS, REPORT at p. 384 (March 31, 1955). The committee's discussion of this point (pp. 382-84) does not clearly explain the basic difference between the different types of consent decrees used in the *Paramount* litigation.

¹⁰² *Ibid.*

¹⁰³ The first paragraph of that section provides "That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws . . . shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant. This section shall not apply to consent judgments . . . entered before any testimony has been taken." This last sentence automatically made the 1940 consent decree in the *Paramount* case inadmissible as evidence. The suggestion that, by the same token, it should not be considered as suspending the tolling of the statute of limitations pursuant to the second paragraph of Section 5 appears convincing. Comment, *Section 5 of the Clayton Act-Consent Decrees and the Statute of Limitations*, 22 U. OF CHI. L. REV. 514 (1955).

¹⁰⁴ REPORT OF ATTORNEY GENERAL'S COMMITTEE, p. 385.

In other words, this somewhat cryptically worded sentence may mean that the tolling period should not be cut off by a non-final consent decree which was entered before any testimony was taken, since such a decree would not be admissible in any private suit. If so, it would satisfactorily qualify the Committee's previously discussed recommendation with respect to the duration of the tolling period. Otherwise, this would unduly limit the present tolling provision without any showing of need for such a change.

III. TOWARD A CONGRESSIONAL SOLUTION.

A situation similar to the one we have described in this article existed in the field of minimum wages and maximum hours: The Fair Labor Standards Act of 1938¹⁰⁵ was enacted without a statute of limitations. In 1947 Congress corrected this omission by adding such a statute.¹⁰⁶ However, no similar correction has yet been made with respect to the antitrust laws, although bills proposing a uniform statute of limitations are being or have been considered by every Congress since 1949.¹⁰⁷ In view of the seemingly obvious desirability of ending the chaos now prevailing in this area it would appear to be astonishing, or even incredible, that these repeated efforts have not, as yet, been successful.

The first of these bills was introduced in the 81st Congress at the request of Mr. George B. Burnham, president of the Burnham Chemical Company. That Company, as noted above, had lost its suit in the Ninth Circuit against Borax Consolidated, Ltd., and other participants in an alleged Borax cartel on the ground that the statute of limitations barred the action and that there was no showing that the cause of action had not or could not have been discovered before 1944.¹⁰⁸ As soon as the decision adverse to the Burnham Company became final by the Supreme Court's denial of certiorari, Mr. Burnham appealed to Congress and two practically identical bills were introduced in each house. Mr. Burnham also submitted extensive memoranda setting forth the history of his fight against the big producers of borax and explaining his purposes as designed to "give small business a better chance to curb monopoly."¹⁰⁹ These bills provided for a six-year statute of limitations; if the action was based upon an alleged conspiracy, the action would be barred "within six years after the

¹⁰⁵ 52 STAT. 1060-69 (1938), 29 U.S.C.A. §§201-219 (1947).

¹⁰⁶ 61 STAT. 87 (1947), 29 U.S.C.A. §255 (Cum. Supp. 1954).

¹⁰⁷ S. 1910, 81st Cong., 1st Sess., *Hearings, supra* note 15. See also Part 2 of the same hearings (August 4, 1949), hereinafter referred to as *Senate Hearings* No. 2. H.R. 7905 and H.R. 8763, 81st Cong., 2d Sess., *Hearings, supra* note 8. H.R. 3408, 82d Cong., 1st Sess., *Hearings, supra* note 4. H.R. 467, 83rd Cong., 1st Sess. H.R. 794, 84th Cong., 1st Sess. Introduced by Mr. Keating on January 5, 1955). REPORT OF ATTORNEY GENERAL'S COMMITTEE, *supra* note 101 at 383, has also recommended amendment of Section 4 of the Clayton Act by adding a four year statute of limitations.

¹⁰⁸ See text to notes 84 and 85 *supra*.

¹⁰⁹ *Hearings, supra* note 15, at 16-30; *Senate Hearings* No. 2 pp. 63-78; *Hearings, supra* note 8, at 24-40, 74-75, 78-85.

discovery by the plaintiff of the facts upon which he relies for proof of the existence of such conspiracy, if the plaintiff has exercised due diligence in seeking to discover such facts."¹¹⁰

It will be remembered that the Ninth Circuit, in the *Burnham Chemical Co.* case, held that many years before commencement of the suit plaintiff knew or ought to have known that its business had been damaged by defendants' antitrust violations. However, the language of these bills, by focusing attention on knowledge of the facts on which plaintiff relied for proof, might, conceivably, have been interpreted more favorably to Mr. Burnham. Indeed, Mr. Burnham had contended in the litigation that he relied on the facts alleged in the Government's complaint which was filed in 1944. Moreover, these bills contained no provisions preventing retroactive applicability. Could this mean a possible retrial of a lost case?

Under these circumstances, it is not surprising that vigorous opposition developed at the hearings.¹¹¹ Professor Handler told the House committee that the discovery provisions of these bills "introduce an uncertainty which is repugnant to the very idea of a statute of repose."¹¹² He pointed out that it was not clear whether "the facts" would mean all the facts, and whether "relied upon" referred to "the facts necessary to establish the existence of the conspiracy or merely such evidence as may be relied upon by the plaintiff in his good judgment as relevant and material?" The latter would be unfair to defendants and "will clutter the courts with protracted litigation over stale events of ancient vintage."¹¹³ It should be added that these provisions were unnecessary, since, as we have demonstrated above, the courts are always willing to consider an allegation that plaintiff, even with utmost diligence, could not have discovered the facts of a conspiracy which defendants tried to conceal. Of course, plaintiff would have the burden of proof, and in the *Burnham Chemical* case the court merely found that such an allegation had not been substantiated. All subsequent bills, therefore, wisely dropped these discovery provisions. The bill now pending in the 84th Congress simply states that the cause of action shall be barred unless commenced within the time specified "after the cause of action accrued." It also meets objections against revival of causes of action which would be barred under existing law by expressly forbidding such revival.¹¹⁴

¹¹⁰ S. 1910, 81st Cong., 1st Sess., *Hearings, supra* note 15, at 1; H.R. 7905, 81st Cong., 2d Sess., *Hearings, supra* note 8, at 1.

¹¹¹ To make matters worse, the House bill proposed to change the provision in Section 5 of the Clayton Act, that a judgment obtained by the Government against an antitrust defendant shall be prima facie evidence against such defendant in private litigation, to make such evidence conclusive. *Hearings, supra* note 8, at 2. Subsequent bills omitted this proposal.

¹¹² *Id.* at 20.

¹¹³ *Id.* at 21, 22.

¹¹⁴ H.R. 794, 84th Cong., 1st Sess. *Hearings, supra* note 8 at 77 and *Hearings, supra* note 4 at 39: objections against retroactive application.

The bill before the 82nd Congress was vigorously opposed by counsel for the Motion Picture Association, consisting of the producers and distributors of motion pictures.¹¹⁵ He described the alleged danger to his industry resulting from excessive treble damage suits, but the statistics submitted by him tabulated only claims without showing the amounts actually recovered.¹¹⁶ He heavily emphasized that there were "changing concepts in the courts, making things illegal which were formerly legal,"¹¹⁷ such as block booking,¹¹⁸ but he admitted that the Department of Justice had never approved that practice.¹¹⁹ Moreover, a witness for independent theater owners demonstrated that block booking, which denied to independent exhibitors freedom of choice of films, had been under fire for many years, and was held illegal by the district court in the first *Paramount* decision in June 1946.¹²⁰ In this connection it is essential to observe that the majority of antitrust damage actions brought by exhibitors are based on the Government's successful suit against *Paramount*; hence, the argument that defendants in that suit could not have foreseen its adverse result is, in substance, an argument against any private liability rather than against a uniform federal statute of limitations. Yet, no one has seriously proposed the abolition of private liability.¹²¹

In summary, the motion picture industry centered its attack on the proposed limitation period of six years; it recommended a three-year period¹²² as representing an average between the various state periods and as being entirely adequate, particularly in view of the tolling provisions of the Clayton Act.¹²³ Counsel for the industry also suggested that the period of limitation for private actions and Government prosecutions should be the same.¹²⁴ The latter was recently increased to five years,¹²⁵ and, perhaps for that reason, the bill now pending provides for that period. The same period should also be made applicable to injunction suits under Section 16 of the Clayton Act.

In addition the pending bill would modify the suspension provisions of Section 5 of the Clayton Act: Under this proposed amendment, a

¹¹⁵ *Hearings, supra* note 4, at 37-49, 57-72.

¹¹⁶ *Id.* at 109-111. *Cf. id.* at 92.

¹¹⁷ *Hearings, supra* note 4, at 64.

¹¹⁸ "The practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period. . . ." U.S. v. *Paramount Pictures*, 334 U.S., at 156.

¹¹⁹ *Hearings, supra* note 4, at 70.

¹²⁰ *Id.* at 86-89.

¹²¹ REPORT OF ATTORNEY GENERAL'S COMMITTEE, *supra* note 101, at 379, favors "vesting in the trial judge discretion to impose double or treble damages."

¹²² *Hearings, supra* note 4, at 71.

¹²³ *Id.* at 59, 60, 62. For a compilation of the different periods, see *id.* at 109-111.

¹²⁴ *Id.* at 38.

¹²⁵ See note 5 *supra*.

private action would have to be brought either within one year after termination of the Government suit or within five years after the cause of action accrued.¹²⁶ Thus, if the cause of action accrued in 1955 and the Government's suit involving the same defendant were filed in 1957 and terminated in 1963, the private action would have to be filed not later than 1964; without this amendment, plaintiff could wait until 1966, since only two of the five years had elapsed when the suspension began. Implicit in this proposal is the idea that private antitrust claimants should closely watch Government suits affecting their interests and move fast as soon as the Government suit has ended. Although there may be legitimate differences of opinion as to this proposal, which is hostile to plaintiffs in some circumstances, it would appear to be defensible on the ground that private litigants usually experience no difficulty in keeping informed through their trade associations about Government antitrust suits involving their industries.

We hope to have demonstrated in the preceding pages that the confusion of the present law can be eliminated only by Congress, and that six years would seem to be more than ample for legislative consideration of this problem. Legislative action should be delayed no longer.

¹²⁶ H.R. 794, 84th Cong., 1st Sess., would amend §5 as follows: ". . . the running of the statute of limitations . . . shall be suspended during the pendency thereof *and for one year thereafter: Provided, however, that whenever the running of the statute of limitations in respect of a cause of action arising under Section 4 . . . is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within five years after the cause of action accrued.*" (Matter in italics is new.) A similar recommendation was made in the REPORT OF ATTORNEY GENERAL'S COMMITTEE, *supra* note 101, at 384.